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No. 76-230

In the Supreme Court of the United States

OCTOBER TERM, 1976

HOWARD P. GISKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that an affidavit in support of an application for the issuance of a search warrant contained insufficient facts to establish probable cause.

Following a suppression hearing in the United States District Court for the Northern District of New York, the court denied petitioner's motion to suppress as evidence laboratory equipment and a quantity of methamphetamine, a Schedule II controlled substance, seized pursuant to a search warrant from his home. Petitioner thereafter pleaded guilty to one count of manufacturing and possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a), reserving, with the government's consent, his right to appeal the denial of

his suppression motion.[1] Petitioner was sentenced to a term of three years' imprisonment, all but six months of which was suspended in favor of probation. The court of appeals affirmed (Pet. App. A).

In his suppression motion, petitioner challenged the sufficiency of the affidavit that Special Agent Mangor of the Drug Enforcement Administration (D.E.A.) submitted in support of the application for a warrant to search petitioner's house for an illicit laboratory for manufacturing methamphetamine. The affidavit recited the following facts (Pet. 3-4; Appellant's Brief and Appendix below at 21-22): That on May 7, 1975, a Howard Cooper, who alleged that he represented Educational Research, Post Office Box 721, Saranac Lake, New York, placed an order for phenyl-2-propanone and laboratory equipment; that the contact telephone number given by Cooper when placing his order was listed to petitioner's residence (the place for which the warrant was sought); that on July 28, 1975,[2] an informant, who was described as a person who "has demonstrated a pattern of reliability in the past," was greeted at the front door of petitioner's residence by an unknown male "who had white flakes of an unknown substance scattered on his hair and beard," and that the informant smelled a strong chemical odor which he described as a "putrified odor"; that the address given by Cooper was believed to be a subterfuge address used to order precursors to the manufacture of methamphetamine; and that the affiant then learned from a D.E.A.

[1]This was done in accordance with the procedures outlined by the Second Circuit in *United States* v. *Burke*, 517 F. 2d 377.

[2]The affidavit inadvertently stated that this event took place on July 28, 1975. The affiant testified at the suppression hearing, however, that he told the magistrate under oath prior to the issuance of the warrant that the date was August 28, 1975—only a few hours prior to the issuance of the warrant (Suppression Tr. 65-67).

chemist that "a putrified odor is indicative of amine free bases such as amphetamine or methamphetamine." The warrant was issued and executed the next day, and methamphetamine and paraphernalia for an illicit laboratory were seized.

Based upon a common-sense reading of the entire affidavit, *Spinelli* v. *United States*, 393 U.S. 410, 415; *United States* v. *Ventresca*, 380 U.S. 102, 108, the information presented was sufficient to establish probable cause to believe that evidence of a crime would be found in petitioner's home. The order for laboratory equipment and phenyl-2-propanone was made by a man allegedly representing Educational Research, who gave the telephone number of petitioner's residence instead of a business telephone. As phenyl-2-propanone was the only chemical ordered, the magistrate could conclude that phenyl-2-propanone was destined for use as a precursor to the manufacture of methamphetamine.[3] This information, combined with the personal observations of the informant that he smelled a putrified odor and saw white flakes in a man's hair and the statement of the chemist that the odor reported indicated the manufacture of methamphetamine, supported the magistrate's finding that the phenyl-2-propanone and laboratory equipment ordered had probably reached petitioner's premises and was being used there for the manufacture of methamphetamine.[4]

[3]The presence of precursors may be used in determining probable cause. *United States* v. *Noreikis*, 481 F. 2d 1177, 1178 (C.A. 7), vacated in part on other grounds, 415 U.S. 904; *United States* v. *Moore*, 452 F. 2d 569, 572 (C.A. 6), certiorari denied, 407 U.S. 910.

[4]Contrary to petitioner's assertion (Pet. 6), the information provided by the informant was not based "on mere belief or suspicion" but on his observations based on sight and smell, and it thus satisfied the two prongs of the test in *Aguilar* v. *Texas*, 378 U.S. 108.

Nor was the reliability of the informant undermined because the affidavit did not specify that the informant's pay was conditioned on ultimate conviction.[5] The informant was described as a person who "has demonstrated a pattern of reliability in the past," see, *e.g.*, the affidavit sustained in *Rugendorf* v. *United States*, 376 U.S. 528, 530, and the reliability of his information about petitioner's residence was supported by information that the telephone used to order the precursor was listed at petitioner's residence. In view of the corroborating information furnished to the magistrate, the contingent fee arrangement could have had no significant bearing on the informant's reliability or the sufficiency of all of the information in the affidavit to establish probable cause.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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[5]Paying an informant for the value of his services is not impermissible *per se*. See *United States* v. *Jett*, 491 F. 2d 1078, 1081 (C.A. 1); *Heard* v. *United States*, 414 F. 2d 884, 886 (C.A. 5); cf. *United States* v. *Crim*, 340 F. 2d 989, 990 (C.A. 4).